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Supreme Court of the United States

OCTOBER TERM, 1967

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,

v.

CHARLES W. BASSETT, TRUSTEE, ET AL.,
Respondents.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS WITH PETITION ANNEXED

SECOND REPLY BRIEF

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November 29, 1967

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SECOND REPLY BRIEF

1. The concert of opposition against petitioner's motion to stay the forced vote on the plan demonstrates the efficiency of the New Haven's *claque*. Given the opposition of the office of the Solicitor General, we would not expect that Mr. Justice Fortas or Mr. Justice Black would stay the vote. Yet the forcing of this vote seems a unique departure from Commission practice, which has hitherto respected judicial review proceedings. The ballots went out November 17. Relief has become more imperative.

2. The Solicitor General dissociated himself from the opposition, on the ground that he formerly represented the B&P trusteeship in appellate proceedings. See *Warren* v. *Palmer,* 310 U.S. 132. Mr. Griswold has personal knowledge and insight into the judicial deprivation of B&P, and it is ironic and unfortunate that he should stay his hand now. He would not have put the United States under a contract sanctified by New Haven Court Order 347 to support New Haven's claim on the false debentures against B&P. Yet that is exactly what happened. See Appendix C to the mandamus petition, page 29, paragraph 5, beginning . . .

> "5. Perhaps the New Haven's most effective ploy has been to bring into alignment the Department of Justice as a special ally against B&P. The debentures have been cleverly twisted into a sort of federal paper tiger. . . ."

3. On November 8, 1967, the First Circuit, with opinion by Chief Justice Aldrich, reversed the District Court in favor of the Commonwealth of Massachusetts, by holding that the Commonwealth may take the B&P main-line section north of Readville without going through the reorganiza-

tion court. On that basis the Commonwealth is preparing to commence takings of adjacent land for Interstate Highway 95 before the end of this year and is eager to get the B&P line, according to the plan originated by petitioner. The New Haven obtained the district court order blocking the Commonwealth, which Chief Judge Aldrich has now reversed. It has now obtained the vote of the stockholders (with the ballots to be counted on December 18) as another roadblock. Its purpose is to force transfer of title into the New Haven before the Commonwealth can acquire it from B&P. If the Commonwealth gets there first, then it will pay B&P. If New Haven gets there first, then the Commonwealth will pay the New Haven. If the funds get into the B&P treasury, it would be possible to extricate B&P from bankruptcy as no longer insolvent. If the funds get into the New Haven treasury, it will be because the plan is forced through. Under the fine type of its CCBI clause, New Haven will deduct an amount which it estimates as $7,400,000 to pay for grandiose construction on the parallel Midland Route — for the benefit of Penn-Central. This case has reached the stage of a TV Western climax.

4. This month has produced another major appellate reversal. The Commission's plan valuation of B&P's properties was based on a 1964 statement of the New Haven's general real estate agent estimating their total scrap value (or liquidating value) as $9,500,000. (See Appendix C, page 22.) However, in the *Hudson Tubes* case, the New York Court of Appeals now repudiates scrap value as the measure of just compensation for deficit-ridden railroad properties. The Appellate Division had awarded "virtually nothing" for the tunnel property, "since the property would in liquidation bring at most a nominal sum, if that." (Mimeo sheet 5) The Court of Appeals increased that to $30,000,000, finding scrap value repugnant, no matter how great the deficits.

> "Considering all these factors, we believe that the award of $30,000,000 made by Special Term and predicated on the conclusion that the condemnees should at least be repaid for the depreciated original cost of the tunnels is fair and just and that an award either considerably above or below that figure would be "manifestly unjust" to the owner whose property is taken and the people who must pay the bill." (Mimeo Sheet 9)
>
> *Hudson Rapid Tubes Corporation* v. *Port Authority Trans-Hudson Corporation.*
> N. Y. Court of Appeals, No. 100 (1967)

If this were a federal decision it would make a conflict of the circuits necessitating Supreme Court review. Yet it is a decision repudiating the scrap value test for just compensation for an interstate railroad taken by condemnation. Sales through plans of reorganization under Section 77 are deemed to be forced by operation of federal law, granting the owners the right to just compensation. This decision has been injected by New Haven bondholders into the parallel pending Penn-Central merger proceeding, the part on which hearing commences before the I.C.C. on November 29, 1967 (today) which is aimed at determining fair terms for sale of the New Haven properties, *and resale of the B&P properties,* to Penn-Central, through a plan of reorganization for the New Haven R.R. Company under Section 77. (I.C.C. F.D. 21,669, 21,989.)

This Court can now provide valuable guidance by granting certiorari or mandamus herein in light of the new decision.

5. *Chief Judge Aldrich's letter* of November 14 to the Chief Justice is illuminating. A copy is appended as Petitioner's Appendix E. Responding to page 7 of Petitioner's Reply Brief, he points out that, although the rules do not

show it, the clerk has been instructed to tell an attorney who complains that his client cannot pay the printing costs that he may file a motion for permission to dispense with printing.

It happens that Chief Judge Aldrich, being a neighbor of one member of the Development Group, and having attended boarding school with two other members, would realize that they do not qualify personally for such relief. The problem herein was the impossibility of reprinting with no time.

His letter, however, would seem to indicate that the imposition of the requirement of reprinting really was a big departure from the intended practice of the court, justifying the relief now sought. In trying to reconcile his harsh memoranda, especially the first (Appendix A), with the proceedings in the clerk's office described in the dreary Appendix D to our first Reply Brief, it becomes impossible to escape the conclusion that the entire imbroglio was caused by inadequate communication in the court house, perhaps between the Deputy Clerk and the Clerk, perhaps between the Clerk and the Chief Judge, certainly between the Chief Judge and Petitioner.

In citing Chief Judge Aldrich's letter of November 14 and his reversal of November 8 against the New Haven, petitioner desires to emphasize Judge Aldrich's renowned judicial ability and independence. In alluding to him earlier, petitioner did not intend any contrary implication. Indeed, petitioner has confidence that Judge Aldrich will reverse the district court, if the Supreme Court will instruct that the appeal be heard. Petitioner only intended to show that the present Chief Judge has become the presiding heir of a long informal policy of judicial avoidance which has made the B&P litigation a quagmire. Forcing of the vote for the plan, assuming a vote of acceptance (for the peculiar reasons set forth in petitioner's motion of November 16 to

stay the vote) will almost certainly have the effect of hardening the judicial attitude against going into the merits.

6. In lamenting the judicial degradation of B&P (which petitioner offers to document fully in a further brief) petitioner has spoken only out of veneration for the judicial institution and distress that this litigation has gone so badly awry. The forcing of the vote forecasts more trouble. Even though the Old Colony bondholders, in the first New Haven reorganization, had voted against the plan, the New Haven induced the district court to set aside their rejection, approve the plan, and order consumation of New Haven's acquisition of the Old Colony lines. While review proceedings were pending in this Court they went ahead and exchanged securities.

Conclusion

It is most urgent that this Court now instruct the Court of Appeals to hear petitioner's appeal.

Respectfully submitted,

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November 29, 1967

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BAILEY ALDRICH
Chief Judge

BOSTON, MASS. 02109

November 14, 1967

The Honorable Earl Warren
Chief Justice of the United States
Supreme Court of the United States
Washington, D.C. 20543

My dear Mr. Chief Justice:

Re: Boston & Providence Railroad
Stockholders Development Group
v. United States Court of Appeals
for the First Circuit, et al.
Misc. No. 661.

Petitioner's counsel have favored me, as a respondent in the above entitled matter, with a copy of their reply brief. Since I consider myself only technically a respondent I do not regard it appropriate to reply to any statements therein (or in the earlier papers) insofar as they relate specifically to this case. Insofar as they relate to our practice, however, notably the alleged cost of litigation expense in this circuit, Reply Brief p. 7, for many years we have made use of our local Rule 20 to permit reproduced copies, four in number, rather than printing. While a technical reading of our Rule 17 might suggest that Rule 20 is limited to strictly *in forma pauperis* proceedings, our clerk's office is instructed to tell any counsel who seeks relief because his client cannot afford to print a record or brief to file a motion to proceed

under Rule 20. We grant such motions frequently, and have done so even in a reorganization proceeding.

So far as I know the question never came up in the case at bar, and I mention the subject only so that you will not receive an erroneous impression of our general practice.

Respectfully,

BAILEY ALDRICH
Chief Judge

cc Mr. Justice Fortas
To all counsel.